

1 PHILLIP A. TALBERT
2 Acting United States Attorney
3 ANTONIO J. PATACA
4 Assistant United States Attorney
5 2500 Tulare Street, Suite 4401
6 Fresno, CA 93721
7 Telephone: (559) 497-4000
8 Facsimile: (559) 497-4099

9 Attorneys for Plaintiff
10 United States of America

11
12 IN THE UNITED STATES DISTRICT COURT
13
14 EASTERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 LANE KELLY WHITTENBERG,

19 Defendant.

20 CASE NO. 1:20-CR-00207-NONE-SKO

21 STIPULATION TO CONTINUE STATUS
22 CONFERENCE AND EXCLUDE TIME UNDER
23 SPEEDY TRIAL ACT; FINDINGS AND ORDER

24 DATE: May 5, 2021

25 TIME: 1:00 p.m.

26 COURT: Hon. Sheila K.

27
28 This case is set for a status conference on May 5, 2021. On May 13, 2020, this Court issued
29 General Order 618, which suspends all jury trials in the Eastern District of California until further
30 notice, and allows district judges to continue all criminal matters. This and previous General Orders
31 were entered to address public health concerns related to COVID-19.

32
33 Although the General Orders address the district-wide health concern, the Supreme Court has
34 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
35 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
36 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
37 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
38 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
39 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally
40 or in writing").

41
42 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory

1 and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-
2 justice continuances are excludable only if “the judge granted such continuance on the basis of his
3 findings that the ends of justice served by taking such action outweigh the best interest of the public and
4 the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable
5 unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that
6 the ends of justice served by the granting of such continuance outweigh the best interests of the public
7 and the defendant in a speedy trial.” *Id.*

8 The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
9 T4). The Government’s position is that although the Speedy Trial Act does not directly address
10 continuances stemming from pandemics, natural disasters, or other emergencies, this Court has
11 discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-
12 week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d
13 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed.
14 *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to
15 exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency).
16 The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated
17 by the statutory rules.

18 In light of the foregoing, this Court should consider the following case-specific facts in finding
19 excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7)
20 (Local Code T4).¹ If continued, this Court should designate a new date for the status conference.
21 *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be
22 “specifically limited in time”).

23 **STIPULATION**

24 Plaintiff United States of America, by and through its counsel of record, and defendant, by and
25 through defendant’s counsel of record, hereby stipulate as follows:

26 1. By previous order, this matter was set for status on May 5, 2021.

27
28 ¹ The parties note that General Order 612 acknowledges that a district judge may make
“additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D.
Cal. March 18, 2020).

1 2. By this stipulation, the defendant now moves to continue the status conference until July
2 7, 2021, and to exclude time between May 5, 2021, and July 7, 2021, under 18 U.S.C. § 3161(h)(7)(A).

3 3. The parties agree and stipulate, and request that the Court find the following:

4 a) The government has represented that the discovery associated with this case
5 includes investigative reports and related documents in electronic form, videos, photographs, and
6 digital evidence. All of this discovery has been either produced directly to counsel and/or made
7 available for inspection and copying.

8 b) Counsel for defendant desires additional time to review discovery, consult with
9 her client, and discuss potential resolutions with her client.

10 c) Counsel for defendant believes that failure to grant the above-requested
11 continuance would deny her the reasonable time necessary for effective preparation, taking into
12 account the exercise of due diligence.

13 d) The government does not object to the continuance.

14 e) Based on the above-stated findings, the ends of justice served by continuing the
15 case as requested outweigh the interest of the public and the defendant in a trial within the
16 original date prescribed by the Speedy Trial Act.

17 f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
18 et seq., within which trial must commence, the time period of May 5, 2021 to July 7, 2021,
19 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(i) and (iv) [Local Code
20 T4] because it results from a continuance granted by the Court at the defendant's request on the
21 basis of the Court's finding that the ends of justice served by taking such action outweigh the
22 best interest of the public and the defendant in a speedy trial.

23 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
24 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
25 must commence.

1 IT IS SO STIPULATED.
2
3
4

Dated: April 28, 2021

PHILLIP A. TALBERT
Acting United States Attorney

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
/s/ ANTONIO J. PATACA
ANTONIO J. PATACA
Assistant United States Attorney

Dated: April 28, 2021

/s/ CHRISTINA CORCORAN
CHRISTINA CORCORAN
Counsel for Defendant
Lane Kelly Whittenberg,

ORDER

IT IS ORDERED that the hearing set for May 5, 2021, at 1 pm is continued until July 7, 2021, for a status conference.

IT IS FURTHER ORDERED THAT the period of time from May 5, 2021, through July 7, 2021, is deemed excludable pursuant to 18 U.S.C. §§ 3161(h)(7)(A), 3161(h)(7)(B)(i) and (iv) because it results from a continuance granted by the Court at defendants' request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

DATED: 4/28/2021

/s/ Sheila Oberto

THE HONORABLE SHEILA K. OBERTO
UNITED STATES MAGISTRATE JUDGE